Office-Supreme Court, U.S.
FILED
MAR 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

PADUNGSRI PHINPATHYA,
Respondent

On Writ or Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF AMICUS CURIAE OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

By: JAMES J. ORLOW, ESQ.
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

Of Counsel:
LAWRENCE H. RUDNICK, ESQ.
WASSERMAN, ORLOW & RUBIN
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Summary of Argument	2
I. Whether the Respondent has Accrued the Necessary Seven Years of Physical Presence Required by 8 U.S.C. §1254(a)(1) has Become Moot during the Appellate Process	2
Conclusion	5

TABLE OF AUTHORITIES

Cases	Page
County of Los Angeles v. Davis, 440 U.S. 625 (1979)	3
DeFunis v. Odegaard, 416 U.S. 312 (1974)	4
Hall v. Beals, 396 U.S. 45 (1969)	3
Moore v. Ogilvie, 394 U.S. 814 (1969)	4
Powell v. McCormick, 495 U.S. 485 (1962)	3
Roe v. Wade, 410 U.S. 113 (1973)	4
S.E.C. v. Medical Committee on Human Rights, 404 U.S. 403 (1969)	3
U.S. v. Munsingwear, 340 U.S. 36 (1950)	2
Constitutional Provisions	
U.S. Const. Art. III	3
Statutes	
8 U.S.C. §1254	2, 3
Miscellaneous	
Laurence H. Tribe, Constitutional Law (1978) Sec. 3-14	2
Supreme Court Rule 17.1	4

No. 82-91

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1982

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner

v.

PADUNGSRI PHINPATHYA,
Respondent

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTERESTS OF THE AMICUS CURIAE

The American Immigration Lawyers Association is a non-profit association of lawyers practicing immigration, nationality and citizenship law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigrations laws of the United States. The Association and its members are committed to the development of the jurisprudence of immigration law and believe that the views submitted herein while nevertheless in support of the alien's position would present a different view from that which might be advanced by either party.

SUMMARY OF ARGUMENT

The issue on which this Court accepted for review had become moot during the pendency of the appellate process while at the Court of Appeals. This Court lacks jurisdiction over the issue presented in that there is no longer a lively dispute to present a "case or controversy". Judicial economy and the constitutional rule against advisory opinions requires that the issue before the Court be found to be moot.

I

Whether the Respondent has Accrued the Necessary Seven Years of Physical Presence Required by 8 U.S.C. §1254(a)(1) has Become Moot during the Appellate Process.

It is axiomatic that a case must present a "case or controversy" at all stages of appellate review to be reviewable by this Court. See *U.S. v. Munsingwear*, 340 U.S. 36 (1950). It is now clear that the doctrine of mootness addresses both constitutional concerns and jurisprudential limits. See Laurence H. Tribe, Constitutional Law (1978), §3-14, pages 62-68. This case is moot in both the constitutional sense and review would not be a sound exercise of judicial discretion.

A brief recitation of the agreed facts reveals the mootness of the underlying issue. On or about October 11, 1969 the Respondent Entered the United States at Honolulu, Hawaii. In January of 1974 she departed with her two children to Thailand to visit her mother. She and the children returned to the United States three months later in April of 1974, (J.A. 17-18). She has not departed the United States since that date. These facts are not controverted and are recited in the brief of the Immigration and Naturalization Service, at pages 3-4.

Deportation proceedings were commenced against the Respondent in 1977. Both the Immigration Judge

and the Board of Immigration Appeals found the Respondent to be deportable. Both found, *inter alia*, that she did not have the required seven years of continuous physical presence as set forth in 8 U.S.C. §1254(a)(1). A Petition for Review was filed with the United States Court of Appeals of the Ninth Circuit which reversed the Board of Immigration Appeals as to this issue and as to the issues of good moral character and extreme hardship. (J.A. 1a-13a).

Although the Immigration Service was not in agreement with the rulings on good moral character and extreme hardship, they did not seek certiorari on either of these issues. The only issue on which certiorari was sought and granted is that involving the continuous physical presence requirement.

It is readily apparent, even assuming that the Respondent's departure in 1974 was meaningful interruptive of the seven year physical presence requirement, that she has accrued more than seven years since that time. In fact, she has now accrued nearly nine years of continuous physical presence, which is not in dispute.

A case presents on Article III "case or controversy" only when there continues to be a lively dispute between the parties. There need be a continuing threat of adverse consequences to one of the parties or a significant prospect of future harm. See *Powell v. McCormick*, 495 U.S. 486 at 496 (1962) as well as *Hall v. Beals*, 396 U.S. 45 (1969) and *SEC v. Medical Committee on Human Rights*, 404 U.S. 403 (1972).

The Immigration Service's request for this Court to review this issue runs a foul of this Court's analysis in *County of Los Angeles v. Davis*, 440 U.S. 625 (1979). This case sets up a two part test for analyzing whether an issue has become moot on appeal. First, is there any reasonable expectation that alleged wrong will recur. It is clear that this issue will not recur unless the Respondent departed the United States.

Secondly, whether interim relief has completely and irrevocably resolved the controversy. In this regard this case is much like that of *DeFunis v. Odegaard*, 416 U.S. 312 (1974) where the passage of time rendered the issue moot.

In summary, it is apparent that there is no longer a case or controversy before this Court. Respondent has now plainly accrued the seven years required for statutory eligibility.

It is important to note that none of the exceptions to the mootness rule are applicable herein. In particular, the exception relating to "controversies that are capable of repetition yet evading review" would not apply. See *Moore v. Ogilvie*, 394 U.S. 814 (1969) and *Roe v. Wade*, 410 U.S. 113 (1973). The issue of whether seven years has accrued is by definition one that could allow for full appellate review including this Court while a lively issue continued to be presented by the litigants. This is in contrast to the relatively short periods of time involved in *Moore v. Ogilvie* and *Roe v. Wade*.

From a jurisprudential viewpoint, this case is not appropriate for review. This Court has long refused to entertain hypothetical questions for reasons of sound judicial economy. The issue herein presented need not be decided on this record. The difficult issue presented can be left for another day to be considered upon a record that fully and necessarily presents the issue. This Court should not reach out to decide an important issue of federal statutory construction without the need to do so.

This reasoning was no less applicable when the United States Court of Appeals for the Ninth Circuit heard oral argument on May 6, 1981 or entered its judgment on October 1, 1981. For these reasons so much of its opinion as dealt with interpretation of the "continuous physical presence" rule was beyond that Court's jurisdiction at that time. This Court has supervisory jurisdiction to instruct the Ninth Circuit under the provisions of Rule 17.1 of the Rules of the Supreme Court insofar

as the Court below departed from the usual and accepted course of judicial proceedings by deciding an issue then already moot.

Amicus respectfully suggests, therefore, that so much of the Court of Appeals' decision below as dealt with "continuous physical presence" and "meaningful interruption" be reversed as moot when decided.

CONCLUSION

The issue on which the Court has granted certiorari has become moot during the appellate process. This Court should decline to review the question presented on its merits for constitutional and jurisprudential reasons.

Respectfully submitted,

By: James J. Orlow, Esq.
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181

Of Counsel:
LAWRENCE H. RUDNICK, ESQ.
WASSERMAN, ORLOW & RUBIN
936 Public Ledger Building
Sixth and Chestnut Streets
Philadelphia, PA 19106
(215) 922-1181
Date: